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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARMANDO SALAZAR, Petitioner - Appellant, v. GEORGE GALAZA, Respondent - Appellee.	No. 04-17063 D.C. No. CV-02-05494-WHA MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William H. Alsup, District Judge, Presiding

Argued and Submitted October 21, 2005
San Francisco, California

Before: WALLACE, TROTT, and RYMER, Circuit Judges.

Armando Salazar was convicted of committing a lewd or lascivious act through the use of duress upon his 8-year-old goddaughter, Heather S., in violation of California Penal Code § 288(b)(1). After Salazar's direct and collateral appeals were denied in state court, he filed a petition for habeas corpus pursuant to 28

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

U.S.C. § 2254. The district court denied Salazar's request for an evidentiary hearing and his habeas petition. Salazar now appeals these rulings. We affirm.

I

The California Court of Appeal's determination that sufficient evidence supported the element of duress was not contrary to, or an unreasonable application of, the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), in light of Heather's testimony combined with that of Officer Madruga about Heather's being touched after she said no. *See Juan H. v. Allen*, 408 F.3d 1262, 1274-75 (9th Cir. 2005), *as amended by* – F.3d –, 2005 WL 1653617 (9th Cir. Jul. 8, 2005) (setting forth standard on federal habeas review).

II

Nor was the state court's determination that Salazar was not denied the right to counsel of his choice contrary to, or an unreasonable application of, clearly established federal law given the trial court's discretion in weighing such factors as the age of the victim, timing of the request to substitute, and judicial efficiency. *See Morris v. Slappy*, 461 U.S. 1, 11-12 (1983); *Wheat v. United States*, 486 U.S. 153, 159 (1988).

III

The California Court of Appeal's determination that the jury instructions regarding prior sexual offenses did not violate Salazar's due process rights is not contrary to clearly established federal law. The instruction on priors was materially different from the instruction faulted in *People v. Falsetta*, 89 Cal.Rptr.2d 847, 923 (Cal. 1999), and *Gibson v. Ortiz*, 387 F.3d 812 (9th Cir. 2004), and did not allow the jury to find Salazar guilty if it found that he had committed prior sexual offenses by a preponderance of the evidence. The jury was clearly instructed that guilt had to be proved beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970); *Cupp v. Naughten*, 414 U.S. 141, 145-47 (1973).

IV

Many of Salazar's ineffective assistance of counsel claims turn on his view that counsel could not reasonably pursue a "confusion/overreaction" theory, but rather the only effective defense strategy would be making Heather out to be a liar. The California Court of Appeal rejected Salazar's position without explanation, so we independently review the record. *Greene v. Lampert*, 288 F.3d 1081, 1088-89 (9th Cir. 2002). We cannot say that counsel's approach (arguing that the adults

who heard Heather's story failed to do what they should have done) falls outside the "wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Nor is there any indication that any of the witnesses Salazar suggests that counsel should have interviewed with respect to Heather's credibility would have cooperated or provided information helpful to the defense. Hearsay in the Joann Salazar and Monica Fernandez declarations is insufficient to meet Salazar's burden under *Strickland*. Likewise, Salazar cannot have been prejudiced by counsel's failure to put Joann Salazar on the stand to testify to Heather's purported inconsistent statement because evidence of any touching, whether over or under her clothing, would have been detrimental. Similarly, failure to bring out Heather's use of the "sexual" terminology that Salazar now points to cannot have been prejudicial because there was evidence that she used the term "peaches," and there is no showing that any other language would have made any difference to the outcome.

Failure to object to Chapa's testimony was neither deficient nor prejudicial as the trial court had indicated that there was sufficient notice. That others may have thought Salazar had not molested their children does not show that he did not molest Heather. Failing to object to Margaret Salgado's testimony was not deficient for Heather's state of mind was in issue; failing to object to testimony of

Joann Salazar and Sonia Salgado was not deficient or prejudicial because the jury was instructed to consider it only for a limited purpose; and Madruga's testimony was admissible in any event as a prior inconsistent statement, so failing to object was not prejudicial. Not raising an objection to the confession was not ineffective as it allowed Salazar's denial to come in; the bear-hug statement that also came in was not prejudicial as it was not necessarily inconsistent with Salazar's position that he did nothing more than this. As the California Court of Appeal held, failing to object to closing argument is seldom ineffective and it was not unreasonable to conclude that it was not here: the prosecutor's statements in closing argument were based on common experience or the evidence.

As we see no error, there is no cumulative error.

V

Finally, Salazar's argument that the district court should have granted an evidentiary hearing to test trial counsel's credibility fails. It was reasonable for Davis not to have called Chapa's mother until after Chapa's testimony. In any event, whether or not Chapa's mother would now support the truth of her account to the police says nothing about what indications she gave at the time of trial. *Strickland*, 466 U.S. at 690 (counsel's performance is measured as of the time of

the conduct). Neither does evidence that trial counsel "misspoke" in an unrelated case raise a colorable claim that he is incredible (or was ineffective) in this case. *Cf. Earp v. Stokes*, 423 F.3d 1024, 1038, 1043-44 (9th Cir. 2005) (remanding for evidentiary hearing when the evidence demonstrated a colorable claim of inadequate investigation that, if proven true at a hearing, would show deficient performance and a reasonable probability that the outcome of the proceeding would have been different).[1]

AFFIRMED.

[1] Given this disposition, there is no need to reach Salazar's request for investigation fees.